Supreme Court, U.S.
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No. 82-646

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

MOTION OF APPELLANT OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

SIDNEY H. YATEMAN
ATTORNEY AT LAW
1031 PARKWAY DRIVE
PEBBLE BEACH, CA 93953
TELEPHONE: (408)375-4221

IN PROPRIA PERSONA

DECEMBER 29, 1982

IN THE SUPREME COURT OF THE UNITED STATES

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APPELLEES MOTION TO DISMISS OR AFFIRM

The Appellant moves that the Court oppose Appellee's motion to dismiss the appeal herein and to oppose in the alternative to affirm the judgment of the Court of Appeal of California on the grounds that: (1) the federal question sought to be reviewed was timely and properly raised and was not considered or discussed by the Court; and (2) that the judgment does not rest on an adequate nonfederal basis.

BASES FOR THE MOTION

I. No Voluntary Stipulation was made by Appellant nor was authorization given by Appellant for his attorney to enter into a stipulation involving Military Compensation.

II. Appellant's Affidavit filed in December, 1979 to set aside the Interlocutory Judgment was altered by his attorney when attorney removed incriminating comments about the attorney and then reworded the affidavit to read as submitted.

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STATUTES CITED

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I

NO VOLUNTARY STIPULATION WAS MADE BY APPELLANT NOR WAS AUTHORIZATION GIVEN BY APPELLANT FOR HIS ATTORNEY TO ENTER INTO A STIPULATION INVOLVING MILITARY COMPENSATION.

Appellee has referred to and argued Appellant's malpractice case against his attorney in her motion to dismiss or affirm. Appellant recognizes that the issue of malpractice is separate and apart from this case and not before the Court. However, since Appellee has raised this issue, Appellant must clarify the erroneous impression created by Appellee.

The Court is directed to the Jurisdictional Statement in which part F of the Questions are Substantial is found on pages 38-44. It should be further noted that the specific events included the following; all of which have been presented to and ignored by both the State Appellate and Supreme Courts.

Chronologically, the events occurred as follows:

A. At the time that the attorney of

record was engaged to respond to petitioner's petition for dissolution in California, appellant had already served petitioner with a similar petition from their home state of Florida. The Florida petition was intended to preserve appellant's separate property rights when petitioner deserted appellant.

B. The Florida case was dropped with the assistance of the previous attorney of record but with the understanding that all military entitlements would be claimed as separate property in California.

C. The initial financial declaration of March 24, 1978, specifically excluded military entitlements from the community property assets. This was filed with the trial court on April 13, 1978 but was not made a part of the Clerk's Transcript before the Appellate Court. A copy was attached to Appellant's Petition for Rehearing as Exhibit A.

D. The Court of Appeal noted in its decision that a stipulation was entered into by appellant on military entitlements. Such

is not the case. On or about April 12, 1978, appellant was called by attorney of record to come to his office. Upon arrival, appellant was presented with a Response (Marriage) form upon which was added (in type out of alignment with other entries) to the previous version "9. Potential partial community interest in Respondent's military retirement." That document was also not made a part of the Clerk's Transcript. A copy was provided in Appellant's Petition for Rehearing as Exhibit B. Appellant refused to sign it at which time attorney insisted. When Appellant further refused and asked why he had to do so, attorney became flushed, pounded his fist on the desk and stated "It's the law." Appellant stated "the law in this matter is wrong, the military entitlements are intended solely for the service member, and the law should be changed." Attorney stated that Appellant had to sign this document. Appellant was led to believe that to not sign the response would be illegal. Attorney's actions amounted to duress

especially in light of the emotional state of Appellant at that time. Appellant told attorney that even if he was forced to sign it the way it was presented by attorney, Appellant would not pay it and would take the case to the U. S. Supreme Court so that California would recognize the separate property nature of military entitlements. Appellant gave no authorization for a stipulation on this matter.

E. On June 20, 1978 and August 2, 1978, Appellant was required to amend his financial declarations by attorney when Appellant had child custody. Copies were provided as part of the Petition for Rehearing as Exhibits C and D. On August 22, 1978, prior to trial, Appellant was again required to amend his financial declaration by attorney. On each of these three (3) occasions Appellant refused to agree that military entitlements were community property and stated to attorney "I don't know why I have to do this when I am so much in disagreement with it." Each time attorney would gaze at Appellant and either

shrug his shoulders or say "it's the law." Appellant told attorney on each occasion that even if he had to sign the paper he did not agree to divide his military entitlements and would never do so.

F. During the period in which the above mentioned financial declarations were amended, petitioner submitted her financial declaration on August 3, 1978 in which no community property interest was stated for military benefits. Whatever stipulation was entered between petitioner's and appellant's attorneys, it was done so without knowledge of or authorization from appellant. The first indication that appellant had that such a stipulation was being made was at trial in open court.

G. At trial on August 24, 1978, attorney entered into a stipulation in open court which included military entitlements. Appellant did not authorize such a stipulation but found himself cut off at every attempt to oppose it when he passed notes to attorney.

H. The Court of Appeal noted that the appeal from paragraph 10 of the interlocutory judgment of dissolution of marriage was not made when other appealable areas were appealed. The fact of the matter is that appellant requested that it be included in the appeal since it was not what he had agreed to but attorney said it could not be done since it was the law in California. Appellant objected to the community property classification verbally to attorney on several dozen occasions from April 13, 1978 and throughout the first appeal. Several other issues were appealed by appellant on lesser important matters. Appellant did request that the military retirement issue be appealed also since it was his intent to do so long before he ever heard of Milhan or McCarty.

I. All of the above took place in an environment of appellant's battalion command duties, a probation study, house and property disposition, and family disruption. Appellant depended totally on attorney to

carry out his requests. Attorney recently stated that he had taken the actions he did because he though appellant was stubborn, trying to make law, and would incur excessive attorney fees in the process. (In fact, attorney fees amount to approximately $19,000.00 since appeals were submitted by appellant anyway). However, ethical consideration 7-7 of the Model Code of Professional Responsibility published by the American BAR Association states that "the authority to make decisions is exclusively that of the client and if made within the framework of the law, such decisions are binding on his lawyer." In this case appellant never waivered from characterizing his military entitlements as separate property. Appellant made no agreement to the contrary and did not authorize such a stipulation.

J. After the decision In Re Marriage of Milhan II (1979) 97 Cal. App. 3d 41, appellant became aware that it was not illegal to claim separate property on

military entitlements. Appellant obtained briefs from Commander Milhan and requested that appellant's attorney again correct the matter of stipulation. Attorney decided to use California Code of Civil Procedure Section 473 to submit the material provided to him by appellant. At this time appellant had entered law school and was selected for War College corresponding studies in addition to his regular duties. Appellant depended on attorney for the correctness of Section 473 applicability in lieu of some other procedure such as a collateral attack with an evidentiary hearing. Such a hearing would have revealed the facts stated above and would have reflected poorly on attorney. Use of the C.C.P. Section 473 negated a separate evidentiary hearing. The briefs from Commander Milhan were obtained after his DCA decision in September 1979 but appellant's attorney did not file a motion using the information until December 12, 1979, several weeks after the appellant's first appeal decision was rendered on November 29, 1979.

II

APPELLANTS AFFIDAVIT FILED IN DECEMBER 1979 WITH A MOTION TO SET ASIDE THE INTERLOCUTORY JUDGMENT WAS ALTERED BY HIS ATTORNEY WHEN ATTORNEY REMOVED INCRIMINATING COMMENTS ABOUT THE ATTORNEY AND THEN REWORDED THE AFFIDAVIT TO READ AS SUBMITTED.

Appellant's statement as originally written by him as part of the motion to set aside the stipulation stated that attorney did not permit a separate property classification of military entitlements as mentioned above. It was rewritten by attorney to read as it was submitted by removing that and other facts. Appellant was not aware that attorney was attempting to conceal facts which would reflect on his fraudulently entering into a stipulation which appellant did not authorize and adamantly opposed.

Attorney of record acknowledged to the Court of Appeal in both Supplemental Points and Authorities submitted on April 19, 1982 and in oral argument that appellant did not voluntarily stipulate to the paragraph 10 of the interlocutory decree and that appellant

said all along that he would not pay it. However, attorney's discussion is a faint effort and barely touches on the totality of the events which led to the stipulation fraudulently made by attorney.

Appellant's malpractice case mentioned by appellee for injury caused by attorney has no bearing on the merits of the federal issues in this appeal.

CONCLUSION

There is thus pending before this Court an appeal that timely challenges the characterization of military retired compensation as community property and exposes the failure of the State Courts to address the Federal issues. Accordingly, the Appellee's motion to dismiss or affirm should be denied.

Respectfully Submitted,

SIDNEY H. YATEMAN
1031 PARKWAY DRIVE
PEBBLE BEACH, CA 93953

December 29, 1982 _____
IN PROPRIA PERSONA

DECLARATION OF MAILING

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California, over the age of 18 years, and not a party to the above-entitled cause. My address is Fremont Professional Center, Seaside, CA 93955. I served the foregoing document by depositing a true copy thereof in the United States mails in Seaside, State of California, on December 30, 1982, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

Clerk of the First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94102

Attorney General (3)
State of California
6000 State Building
San Francisco, CA 94102

Honorable Nat A. Agliano
Judge of the Superior Court
Monterey County Courthouse
Post Office Box 1819
Salinas, CA 93902

William B. Daniels Esq., (3)
Attorney at Law
563 Figuero Street
Monterey, CA 93940

Executed on December 30, 1982 at Seaside, California.

I declare under penalty of perjury that the foregoing is true and correct.

Saul M. Weingarten